TAN KIA GAN v. TAN SOCK HOON (f)

[A.C.J. (Rigby J.) August 21, 1958]

[Penang — Civil Appeal No. 10 of 1958]

Husband and Wife — Maintenance — Married Women and Children (Maintenance) Ordinance, 1950, s.3(1).

Practice and Procedure — Jurisdiction — Whether the Married Women and Children (Maintenance) Ordinance, 1950 gives power to a Subordinate Court to summon person not ordinarily resident with its jurisdiction — Case transferred to another Magistrate — Evidence not de novo — Effect of.

This was an appeal from an order of the learned President under the provisions of the Married Women and Children (Maintenance) Ordinance whereby the appellant was ordered to pay a monthly maintenance to his former wife, the respondent, and his infant daughter. The respondent swore a Complaint and Information before a Magistrate praying for a Summons to issue against the appellant under section 3(1) of the Ordinance to provide for the maintenance of herself and the daughter of their marriage. In the complaint itself, the respondent gave her address as resident in Penang and stated that she was married to the appellant "of Malayan Airways (Paya Lebar Airport), Singapore on April 9, 1949 at Singapore Consulate General." Upon her complaint the Magistrate authorised a Summons to issue; the Summons itself was addressed to the appellant at Paya Lebar Airport, Singapore. It was endorsed by the Magistrate for service out of jurisdiction and was duly served upon the appellant in Singapore.

The appellant appeared at the hearing before the Magistrate where he stated:

"This Notice was served on me. I come from Singapore not to show disrespect. The procedure is wrong and for reasons which I am going to give I ask Court not to make an order."

The learned Magistrate, however, heard the evidence of both parties and adjourned the matter for his decision. On the resumed hearing the Magistrate gave no decision but instead he made an order that the case be transferred to another Court for trial *de novo*. As a result of that order the case came on again for hearing before the learned President who contented himself with hearing the evidence of the appellant only, and made the order appealed against.

Held: (1) where proceedings have been started and evidence given before a Magistrate who transfers the case to another Magistrate to be tried *de novo* the proper procedure is to rehear the case *de novo;*

(2) the Married Women and Children (Maintenance) Ordinance, 1950, does not give power to a Subordinate Court in the Federation of Malaya to bring before it a respondent not ordinarily resident within its jurisdiction at the time of the issue and service of the Summons;

(3) the appearance of the appellant did not constitute a submission to jurisdiction when no such jurisdiction existed in the first instance.

Cases referred to:—

(1) *Fulker v. Fulker,* (1936) 3 All E.R. 636.

(2) *Whittle v. Whittle,* (1939) 1 All E.R. 374.

(3) *Bolten v. Bolten,* (1949) 2 All E.R. 908.

(4) *Forsyth v. Forsyth,* (1947) 2 All E.R. 623; (1948) P. 125; 177 L.T. 617; 112 J.P. 60.

(5) *Berkley v. Thompson,* (1884) 10 App. Cas. 49.

(6) *Carrick v. Hancock* (1895) 12 T.L.R. 59.

(7) *Harris v. Taylor,* (1915) 2 K.B. 580; 84 L.J.K.B. 1839; 113 L.T. 221.

(8) *Foster v. Usherwood,* (1877) 3 Ex.D. 1; 47 L.J.Q.B. 30; 37 L.T. 389.

(9) *Macrae v. Macrae,* (1949) 1 All E.R. 290, affirmed by C.A. (1949) 2 All E.R. 34.

CIVIL APPEAL from Magistrate's Court.

Lee Kuan Yew for the appellant.

Eusoffe Abdoolcader, amicus curiae, for the respondent.

Rigby J.: — This was an appeal from an Order made by the learned President of the Sessions Court under the provisions of the Married Women and Children (Maintenance) Ordinance, 1950, whereby the appellant was ordered to pay a monthly sum for the maintenance of his former wife and his infant daughter.

I allowed the appeal since I was wholly satisfied that, for the reasons which I shall later state, the Subordinate Courts of Penang had no jurisdiction to entertain the application of the wife for maintenance in the first instance, but since the matter raised a point of some practical interest and importance, I intimated that I would give my reasons for my decision in writing. I now proceed to do so.

On the 26th October, 1957, the former wife, the respondent to this appeal, swore a Complaint and Information before the Magistrate, Mr. Au Ah Wah, under the provisions of section 3(1) of the Married Women and Children (Maintenance) Ordinance, 1950, asking for a summons to issue against the present appellant to provide for the maintenance of herself and the daughter of their marriage. In the Complaint itself, the complainant gave her address as resident in Penang and stated that she was married to the appellant "of Malayan Airways (Paya Lebar Airport), Singapore on 9.4.1949 at the Singapore Consulate-General." Upon her complaint the

Magistrate authorized a summons to issue. The Summons itself was addressed to the appellant at Paya Lebar Airport, Singapore. It was endorsed by the Magistrate for service out of the jurisdiction and was duly served upon the appellant, in Singapore, on the 12th November, 1957.

The appellant appeared at the hearing before the Magistrate on the 16th November, 1957. According to the record of the learned Magistrate, the appellant there stated:—

"This Notice was served on me. I come from Singapore not to show disrespect. The procedure is wrong and for reasons which I am going to give I ask Court not to make an order."

The learned Magistrate, however, heard the evidence of both parties and adjourned the matter for his decision to be given thereon on the 30th November, 1957. On the 30th November, 1957, the Magistrate gave no decision but instead he made an order that the case be transferred to another Court for a trial *de novo*. It is, I think, clear that the reason why the Magistrate took this somewhat novel course was because a request had been made to him by the appellant at the commencement of the proceedings that the case be transferred to another Court for hearing on the ground that the respondent had from time to time seen the Magistrate for advice. In answer to that request the Magistrate stated upon the record:—

"I inform defendant that applicant has seen me regarding the procedure and I have informed her about the procedure."

He then proceeded to hear the action.

There is clearly nothing improper in a Magistrate informing a complainant of the correct procedure to be followed in an application of this nature; indeed, it would, in my view, be wholly consistent with the duty of a Magistrate to give such assistance to a lay litigant ignorant of the intricacies of legal procedure. However, it is apparent that the learned Magistrate finally came to the conclusion that it would be better in the circumstances if the case was determined by another Magistrate. If that was his considered opinion it is, perhaps, unfortunate that he did not arrive at it at a very much earlier stage rather than to have heard and concluded all the evidence and then made an order which necessitated the rehearing of the evidence, *ab initio*, before another Magistrate.

However, as a result of the order made by the Magistrate the case came on again for hearing before the learned President of the Sessions Court on 13th February, 1958. The learned President, instead of re-hearing the case *de novo*, contented himself with hearing the evidence of the appellant (the respondent to that application) only. He then made the Order which is the subject matter of this appeal.

Mr. Lee Kuan Yew, for the appellant, submitted as a subsidiary argument that in any event the procedure adopted by the learned President was wrong in that since the Order was for a trial *de novo* the evidence given by the respondent/applicant in the first trial could not form part of the record of the proceedings and no judicial notice could or should have been taken of the evidence given in the first trial. In support of this contention Mr. Lee Kuan Yew cited the cases of:—*Fulker v. Fulker*,[1] *Whittle v. Whittle*,[2] *Bolten v. Bolten*.[3]

Since the *ratio decidendi* of this appeal is on the ground that the Subordinate Courts in Penang had no jurisdiction to entertain this application in the first instance, it is unnecessary for me to give an express decision on this ground of appeal. I therefore content myself with expressing the opinion that Mr. Lee Kuan Yew's submission is well founded and that, in my view, the procedure adopted by the learned President in not hearing all the evidence *de novo* was incorrect and the proceedings were, therefore, a nullity.

Turning now to the question of jurisdiction, which is really the main point of this appeal. I entertain no doubt but that the position in law was correctly stated by Mr. Lee Kuan Yew in his submission:—

(1) That the Married Women and Children (Maintenance) Ordinance, 1950, does not give power to a Subordinate Court in the Federation to bring before it a respondent not ordinarily resident within the jurisdiction at the time the summons was issued and served; and

(2) That the appearance of the respondent does not constitute a submission to jurisdiction where no such jurisdiction existed in the first instance.

The case of *Forsyth v. Forsyth*,[4] is, in my view, clear authority for the correctness of both the above propositions. In that case a wife resident in England at the express wish of her husband, sued her husband, resident in Scotland, for maintenance. The summons was directed to, and served upon, the husband at his address in Scotland. The Justices before whom the case was heard in England over-ruled an objection to the jurisdiction made on behalf of the husband, and made an order for maintenance. On appeal by the husband the Divisional Court upheld the decision of the Justices. However, on

further appeal by the husband to the Court of Appeal that Court allowed the appeal and reversed the decision of the Justices. The Court reaffirmed the general principle laid down by Lord Selborne, L.C. in *Berkley v. Thompson*,[5] that a person resident abroad, still more, ordinarily resident and domiciled abroad, was *prima facie* not subject to the process of the Court, but must be found within the jurisdiction to be bound by it. In the course of his judgment Bucknill, L.J., who delivered the main judgment of the Court, after quoting the general principle as laid down by Lord Selborne, went on to say:—

"This general principle finds its place in *Dicey's* Conflict of Laws, 5th ed., p. 398. Rule 95 states:—

'In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—First case — Where at the time of the commencement of the action, the defendant was resident or present in such country so as to have the benefit, and be under the protection of the laws thereof.'

At p. 403 the text states:—

"'.....presence is enough, or in other words .....residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced.

The authority for this statement is *Carrick v. Hancock*.[6] In that case Lord Russell of Killowen, C.J., observed that the jurisdiction of a Court was based on the principle of territorial dominion, and that all persons within any territorial dominion owed their allegiance to its sovereign power and obedience to all its laws and to the jurisdiction of its Courts."

At a later stage in his judgment Bucknill, L.J. said:—

"I doubt whether in a case like the present it is necessary to prove that the husband was ordinarily resident in the jurisdiction at the time when the summons was issued and am disposed to think that mere presence therein is sufficient, but it is unnecessary to decide the point because in this case not only was the husband ordinarily resident in Scotland, but there is no evidence that he was ever in England."

On the submission made to the Court that the husband had submitted to the jurisdiction of the Court by appearing before the Justices through his Solicitor, Tucker, L.J. had this to say:—

"Secondly, it was contended that, even if the husband was, in fact, domiciled and resident in Scotland, he had submitted to the jurisdiction of the justices by reason of the fact that his solicitor had appeared before the justices and cross-examined the wife, and that, accordingly, he could not now be heard to complain of lack of jurisdiction. For this proposition Counsel relied on the well-known authorities which have decided that the Courts of this country will enforce the judgments of foreign Courts of competent jurisdiction where the defendant was at the commencement of the action resident in a foreign country, or where at the time of judgment he is a subject of the sovereign of that country, or where he has by voluntarily appearing in the action submitted to the jurisdiction of its Courts: see *Harris v. Taylor*.[7] In that and other similar cases the Courts have had to consider on the facts of each case whether the defendant had voluntarily submitted to the jurisdiction of a competent foreign Court.

"Such cases have no application to Courts of inferior jurisdiction in the country which derive their jurisdiction from statute. If such an inferior Court lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it. An instance of this principle is to be found in *Foster v. Usherwood*,[8] where, dealing with the jurisdiction of the County Court, Bramwell, L.J., used this language (3 Ex.D.3):—

'It is argued that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the Registrar had no jurisdiction to make the order to try the action in the County Court. The parties cannot by consent confer a jurisdiction which does not exist'."

The decision in *Forsyth v. Forsyth* was followed in *Macrae v. Macrae*.[9] In that case the parties had been living in Manchester where the husband was employed. The husband gave up his job, moved to his parents' home at Inverness, Scotland, and announced his intention to settle there. The wife, still resident in Manchester, took out a summons for desertion, which was served upon the husband in Inverness. On the hearing of the summons the Manchester Justices apparently sought to distinguish this case from *Forsyth's case* by the fact that in the latter case the husband was clearly domiciled in Scotland and there was no evidence that he was ever in England, whereas in the case before them the husband had abandoned his domicile in England in order to take up residence in Scotland. They accordingly made an Order against the husband. On appeal, the Divisional Court reversed the decision of the Justices holding that the husband, being ordinarily resident out of the jurisdiction, the Justices had no power to make an Order against him. The decision of the Divisional Court was affirmed on appeal. In the course of his judgment in the Court of Appeal — a judgment with which Bucknill, L.J. and Wynn-Parry, J. agreed — Somervell, L.J. stated, at pages 36 and 37:—

"The justices found that this man had deserted his wife. The only matrimonial home that they had ever had was with her parents. The husband decided to leave the wife. He went to Scotland where his home and mother were, he said he intended to settle there, and he described in his letter the arrangements that he was making to provide himself with a home there. In those circumstances only one conclusion is possible, namely, that he was ordinarily resident there at that time. The fact that the desertion took place in England and that he was ordinarily resident in England up to a short time before does not affect the matter. Ordinary

residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place — in this case he left his wife; in another case he might have disposed of his house — and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place. For those reasons I think the facts relied on by Counsel for the wife do not displace the conclusion to which the members of the Divisional Court came, that the husband was ordinarily resident in Scotland at the material date, and, therefore, applying *Forsyth v. Forsyth*,(4) the justices had no jurisdiction, and this appeal fails."

It was as a result of these decisions and the inconvenience caused and, indeed, the injustice suffered by deserted wives, that the Maintenance Orders Act, 1950 was enacted. This Act conferred jurisdiction on English Courts to make summary maintenance orders against a man residing in Scotland or Northern Ireland if the applicant in the proceedings resided in England and the parties last ordinarily resided together as man and wife in England.

In the instant case it is clear that the appellant was ordinarily resident in Singapore and that the summons was served upon him in Singapore. Applying the principles of law clearly enunciated by the cases to which I have referred I was satisfied that the Subordinate Courts of Penang had no jurisdiction to entertain this application and the fact that the appellant was present in person at the proceedings could not confer upon the Magistrates a jurisdiction which did not exist in the first instance. I would only make the comment here that if the appellant had been in the habit of visiting the Federation from time to time and if the summons had been served upon him within the Federation on one of these occasions, then it might well be that, following the opinion expressed by Bucknill, L.J. in *Forsyth v. Forsyth*,(4) his mere presence within the jurisdiction at the time the summons was served upon him would have been sufficient to confer jurisdiction upon the Courts here to entertain the summons. But there was no suggestion to that effect.

The proper procedure for the respondent to have followed in this matter was, of course, to have taken action under the Maintenance Orders (Facilities for Enforcement) Ordinance, 1949. Facilities for the reciprocal enforcement of such orders were extended to the Colony of Singapore by Legal Notification 316 dated the 28th May, 1952, with effect from the 17th November, 1949. This Legal Notification was cancelled but re-enacted in almost identical terms by Legal Notification 390 dated the 3rd July, 1952, to take effect from the 1st December, 1949. Under section 5(1) of that Ordinance the applicant should have obtained from the Magistrate's Court, Penang, after having given evidence before that Court, a provisional order for maintenance against her husband. A certified copy of that order, together with the accompanying depositions, would have been transmitted through the appropriate channel to the local Court of the Colony of Singapore having jurisdiction over the husband and the local Court, after having heard the evidence of the husband, would either have confirmed or rescinded the provisional order.

It was for these reasons that I allowed this appeal.

In conclusion I would express my indebtedness to both Counsel for their arguments and, in particular, to Mr. Eusoffe Abdoolcader, who appeared on behalf of the respondent, at my request, and without any fee or remuneration for the services he has given in assisting the Court as *amicus curiae*.

Appeal allowed.

Solicitors: *Lee & Lee; Ong Huck Lim & Co.*

RATNASAMY v. PUBLIC PROSECUTOR

[R.C.J. (Smith J.) August 13, 1958]

[Seremban — Criminal Appeal No. 9 of 1958]

Road Traffic — Accident — Failure to produce Insurance Policy — Motor Vehicles Third Party Risks Regulations, regs, 15(1), 3(2) and 8(1) — Defective Charge.

The appellant, being the driver of a motor vehicle which was involved in an accident, was charged with failing to produce his Insurance Policy to the nearest Police within the prescribed period of 5 days when requested to do so by a Police Officer in uniform, an offence under reg. 15(1) and punishable under reg. 3(2) of the Motor Vehicles Third Party Risks Regulations (GN. 452/46). He pleaded guilty and admitted the facts in the charge. The Magistrate convicted him, fined him $35 and ordered that he be disqualified from holding or obtaining a driving licence for a period of twelve months from the date of his conviction since such an order was mandatory under reg. 3(2) of the Motor Vehicles Third Party Risks Regulations.

Held: on revision that the charge was improperly framed since an offence under reg. 15(1) of the regulation is not punishable under reg. 3(2). Paragraph (2) of the reg. 3 provides punishments for offences under paragraph (1) of reg. 3 only. No specific punishment being provided for an offence against reg. 15, recourse must be had to section 8(1) of the Road Transport Proclamation which